

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 566 OF 2004.

Mr. Salvador Lobo, son of
late Geraldo Lobo, r/o. Umtavaddo,
Calangute, Bardez, Goa.

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Petitioner.

V/s.

1. Ana Vitoria Viera Dalgado Lobo,
about 60 years of age, widow of
Augusto Lobo, r/o. Betim,
Bardez, Goa.
2. Maria Zazuna Guilhermina Leonor
Delgado Lobo, major of age,
Spinster, r/o. Betim, Bardez, Goa.
3. Maria Darita Julieta Delgado e Lobo,
Major of age, spinster, r/o Betim,
Bardez, Goa.
4. Jose Antonio Lobo, 51 years of age,
r/o. Near Don Bosco High School,
Panaji, Goa.
5. Mrs. Nina Lobo, wife of Jose Antonio
Lobo, 41 years of age, residing near
Don Bosco High School, Panaji, Goa.
6. Mr. Ivo Delgado Lobo, about 35 years
of age, son of late Augusto Lobo,
R/o. Alameda Linhas da Torro, no.68-3,
(R.T.P.) Lisboa, Portugal.
7. Ozia Lobo, major of age, spinster,
r/o. Hussein Mansion Sussex Road,
Byculla, Bombay – 27,
8. Olavo Lobo, major of age, Bachelor,
r/o. Hussein Mansion, Sussex Road,
Byculla, Bombay – 27

9. Socorrinha Lobo, spinster, major of age, r/o. Hussein Mansion, Sussex Road, Byculla Bombay - 27
10. Mrs. Carmelina Lobo e Lemos, 62 years of age, widow of Lourenco Lemos, r/o. Sinquerim, Bardez, Goa.
11. Mrs. Blanche Pereira, daughter of Lourenco Lemos, married, major of age, r/o. Housing Board Colony, Porvorim, Bardez, Goa.
12. Mr. Filomeno Pereira, major of age, married, r/o. Housing Board Colony, Porvorim, Bardez, Goa.
13. Mrs. Mela Godinho, daughter of late Lourenco Lemos, major of age, married, r/o. Singquerim, Bardez, Goa.
14. Mr. Aureo Godinho, major of age, married, medical practitioner, r/o. Singquerim, Bardez, Goa.
15. Rene Lobo, wife of John Lobo, r/o. Anjuna, Goa.
16. Nevia Lobo, widow, daughter in law of late Gerald Lobo. Respondents.

Mr. T.R. Furtado, Advocate for the petitioner.

Mr. M.B. D'Costa, Sr. Advocate with Mr. J.A. Lobo, Advocate for respondents No.2, 4 and 5.

CORAM : A.P. LAVANDE, J.

Date of reserving the order :
20/01/2005.

Date of pronouncing the order :
27/01/2005.

ORDER :

By this petition, the petitioner who is defendant No.1(c) in Regular Civil Suit No.409/2000/B(E). (original Special Civil Suit No.239/81), takes exception to order dated 16/10/2004, passed by the Civil Judge, Sr. division, at Mapusa, dismissing the two applications dated 5.12.2003 and 26.7.2004, filed by the present petitioner. By the present petition, the petitioner also assails the preliminary decree dated 14.9.2001 passed by the trial Court in the said suit.

2. Mr. Furtado, learned Counsel appearing for the petitioner submits that the preliminary decree dated 14.9.2001, passed by the trial Court, is without jurisdiction inasmuch as the suit filed by the plaintiffs is not maintainable, without filing the inventory proceedings. In support of his contention, the learned Counsel has relied upon a Judgment of this Court in the case of ***Cruz Fernandes and anr. vs. Smt. Gregorina Estefania Sofia and ors***, (1992 (1) CCC 569). He further submitted that since the preliminary decree passed by the trial Court was without jurisdiction, the decree could be challenged at any time and even in collateral proceedings. He further submitted that it is not necessary for the petitioner to file an appeal against the preliminary decree passed by the trial Court and the trial Court ought to have allowed the applications filed by the petitioner for dismissal of the suit and for setting aside the

preliminary decree, passed by the trial Court. In support of his submissions, the learned Counsel for the petitioner relied upon the following authorities : (1) ***Sunder Dass vs. Ram Parkash*** , (AIR 1977 SC 1201); (2) ***Swaran vs. Gram Panchayat, Malikpur***, (1999 (1) Civil L.J. 223); and (3) ***Prof. Dalip Singh vs. Sant Singh***, (1999 (1) Civil L.J. 225).

Per contra, Mr. M.B. D'Costa, the learned Senior Counsel appearing for respondents No. 2, 4 and 5, submitted that the petitioner ought to have challenged the preliminary decree dated 14.9.2001, passed by the trial Court and in the absence of any challenge by filing an appeal, the trial Court had no jurisdiction to set aside the preliminary decree which was passed by the same Court. The learned Counsel further submitted that the suit filed by the plaintiffs was for partition of the property by metes and bounds and in the alternative, relief was sought by the plaintiffs of selling the property in public auction and payment of the value thereof to the respective parties. The learned Counsel further submitted that the petitioner having not availed of the remedy of appeal against the preliminary decree, the petitioner was not entitled to file the application before the trial Court to set aside the preliminary decree and for dismissal of the suit. It is further submitted that the suit instituted by the plaintiffs cannot be said to be not maintainable and further, it cannot be said that the trial Court had no

jurisdiction to deal with the suit. The learned Counsel further submitted that the petitioner having not preferred an appeal, this Court should not interfere in exercise of writ jurisdiction to set aside the preliminary decree passed by the trial Court. The learned Counsel further submitted that the preliminary decree passed is for all purposes final and conclusive, in so far as the matter decided therein and the decree having been passed by the competent Court, this Court should not interfere in exercise of writ jurisdiction to set aside the preliminary decree and the impugned order. In support of his submissions, the learned Counsel has relied upon the following authorities : (1) **Venkata Reddy and ors. vs. Pethi Reddy**, (AIR 1963 SC 992); (2) **Mool Chand and ors. vs. Dy. Director, Consolidation and ors.** (1995) 5 SCC 631; and **Miss Maneck Gustedji Burjarji vs. Sarafazali Nawabali Mirza**, (1997) 1 SCC 227.

3. I have considered the submissions made by the learned Counsel for both the sides. I also considered the written submissions filed by the learned Counsel for the parties, as well as the authorities cited by the learned Counsel.

4. At the outset, it is pertinent to note that the petitioner has not challenged the preliminary decree dated 14.9.2001 against which an appeal is maintainable under Section 96 of the Code of Civil Procedure.

As rightly pointed out by the learned Counsel appearing for respondents No.2, 4 and 5, ordinarily this Court would not interfere in exercise of writ jurisdiction against a decree passed by the Civil Court. Having regard to the facts and circumstances of the case at hand, I am of the opinion that this not an extra ordinary case in which the writ jurisdiction of this Court can be invoked by the petitioner to challenge the preliminary decree as well as the impugned order dated 16.10.2004. I am unable to accept the submission of the learned Counsel appearing for the petitioner that the preliminary decree passed by the trial Court is without jurisdiction. That being the position, the petitioner ought to have challenged the preliminary decree by filing an appeal challenging the same. The petitioner having not done so, was not entitled to file an application before the same Court to set aside the preliminary decree since the trial Court had no jurisdiction to set aside the preliminary decree, passed by it.

5. In so far as the authorities relied upon by the learned Counsel appearing for the petitioner are concerned, I find that the ratio laid down by the said Judgments is clearly not applicable to the facts in the present case. No doubt, if a decree passed by a Court lacks inherent jurisdiction, the same can be challenged even in collateral proceedings. But as stated above, I am unable to accept the submission made by the learned Counsel appearing for the petitioner that the preliminary decree

passed by the trial Court is without jurisdiction. That being the position, the remedy of writ jurisdiction availed of by the petitioner is clearly misconceived. In view of the above discussion, there is no merit in the present petition filed by the petitioner.

6. In the result, therefore, the petition deserves to be dismissed and is accordingly dismissed summarily, with no order as to costs.

A.P. LAVANDE, J.

ssm.